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TAN WEK PIAU & ANOR v. HIN WONG HUAT SPEED BOAT & ORS

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[ADMIRALTY ACTION IN PERSONAM NO: BA-27NCC-1-01-2019]
12 JULY 2020

B

CIVIL PROCEDURE: *Judgments and orders – Order to dispense from lodging with 'Registry' 'preliminary act' within two months after service of writ – Claim for damages arising from negligence – Boat collision resulted in passenger's brain injury – Whether court could resort to O. 18 r. 19(1) and O. 92 r. 4 of Rules of Court 2012 as well as court's inherent jurisdiction and/or inherent power – Rules of Court 2012, O. 70 r. 17(1)*

C

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out action – Claim for damages arising from negligence – Boat collision resulted in passenger's brain injury – Whether limitation period for action based on tort of negligence – Whether action time-barred under s. 517 of Merchant Shipping Ordinance 1952 – Whether court should exercise discretion under first limb of proviso to s. 517 to extend two-year limitation period – Whether claimant failed to lodge preliminary act within two-month period required by O. 70 r. 18(1) of Rules of Court 2012*

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The first plaintiff boarded a boat ('first boat') at Port Klang jetty with the purpose of going to Pulau Ketam. The first boat collided with another boat ('second boat'), causing the plaintiff to suffer a serious brain injury. In view of the first plaintiff's injury, her husband ('second plaintiff') obtained a court order under O. 76 r. 2(1) of the Rules of Court 2012 ('ROC') to be the first plaintiff's 'litigation representative' in this suit. The first and second plaintiffs ('plaintiffs') filed to recover damages for the first plaintiff's injury from the defendants. In their statement of claim, the plaintiffs pleaded, among others (i) the accident and the first plaintiff's injury were caused by the negligence of the seventh and eighth defendants in skippering the first and second boats respectively; and (ii) the first to sixth defendants were vicariously liable for the seventh defendant's negligence while vicarious responsibility for the eighth defendant's negligence was imposed on the ninth defendant. Three applications have been filed in this action: (i) the plaintiffs sought a court order to dispense the plaintiffs from lodging with the 'Registry' a 'preliminary act' as defined in O. 70 r. 17(1) of the ROC within two months after the service of the writ of this action on the defendants ('two-month period') ('encl. 6'); (ii) the eighth to ninth defendants applied to strike out this action on the grounds that (a) this action was time-barred under s. 517 of the Merchant Shipping Ordinance 1952 ('MSO'); and/or (b) the plaintiffs failed to lodge a preliminary act within the two-month period as required by O. 70

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r. 18(1) of the ROC ('encl. 9'); and (iii) the first to seventh defendant filed an action to strike out this action because it had been filed after the expiry of the two-year limitation period prescribed by s. 517 of the MSO ('encl. 18'). A

Held (allowing encl. 6; dismissing encls. 9 and 18): B

(1) Section 517 of the MSO does not apply to a negligence suit by a passenger in Vessel B who has suffered personal injuries due to the negligence of the skippers of Vessels A and/or B, such as in this action. Hence, s. 517 of the MSO had not prescribed a limitation period for this action within the meaning of s. 3 of the Limitation Act 1953 ('LA') and the six-year limitation period (not the two-year limitation period), applied to this action. This action, which was based on s. 517 of the MSO, could not be struck out as it had been filed within the six-year limitation period. (paras 12 & 14) C

(2) The proviso to s. 517 of the MSO has the following two limbs: (i) the court has the discretion to extend the two-year limitation period (a) to any extend; and (b) on any condition, as the court thinks fit ('first limb'); and (ii) the court 'shall' extend the two-year limitation period if there is no reasonable opportunity for a plaintiff during the two-year limitation period to arrest the defendant's vessel within (a) the jurisdiction of the court; or (b) the territorial waters of the country (1) to which the plaintiff's ship belongs; (2) in which the plaintiff resides; or (3) in which the plaintiff had his principal place of business, and the two-year limitation period shall be extended to an extent which is sufficient to give a reasonable opportunity for the plaintiff to arrest the defendant's vessel ('second limb'). To persuade the court to extend the two-year limitation period in the first limb, a plaintiff has to satisfy the following two cumulative conditions: (i) the plaintiff has a 'good reason' for an extension of the two-year limitation period ('first condition'); and (ii) if the plaintiff fulfils the first condition, the plaintiff has to persuade the court that the 'balance of hardship' lies in favour of an extension of the two-year limitation period ('second condition'). (paras 16 & 18) D E F G

(3) The plaintiffs had discharged the onus to satisfy this court of the two cumulative conditions so as to enable the court to exercise its discretion to grant an extension of the two-year limitation period ('extension order') and allow this action to proceed under the first limb. The first condition was fulfilled in this case as there was a good reason for the extension order. The accident had caused the first plaintiff's injury which substantially diminished her mental capability to file this action within the two-year limitation period. A medical expert who had examined the first plaintiff, provided an expert opinion that the accident had caused a 'traumatic brain injury' to the first plaintiff. Consequently, H I

the first plaintiff suffered and continues to suffer a 'major neurocognitive disorder' ('MND'). Due to the MND, the first plaintiff could not weigh pros and cons. Hence, the first plaintiff could not instruct her solicitors to file this action before the expiry of the two-year limitation period. To fortify this fact, the second plaintiff had been appointed by the court as the first plaintiff's litigation representative in this action. The first plaintiff's 'socio-occupational functioning' (activities of daily living) was adversely affected. The second condition was also met in this case because the balance of hardship laid heavily in favour of the extension order. If the extension order was not granted, there will be a grave injustice to the first plaintiff as the first plaintiff would be unjustly deprived of any monetary relief for the MND. Furthermore, the first plaintiff's MND may worsen with the passage of time. The extension order did not cause any irreparable prejudice to the defendants as the defendants had a right to oppose this action on its merits. (para 19)

(4) The defendants cited O. 18 r. 19(1) and O. 92 r. 4 of the ROC as well as the court's inherent jurisdiction and/or inherent power in support of encls. 9 and 18. The defendants could not rely on O. 92 r. 4 of the ROC, the court's inherent jurisdiction and/or inherent power in light of the specific provisions in O. 70 rr. 17(1) and 18(1) of the ROC. The court could not apply O. 92 r. 4 of the ROC, the court's inherent jurisdiction and/or the inherent power to decide a matter when there is an express provision of written law which provides for the matter. Further, in accordance with the maxim of statutory construction, '*generalibus specialia derogant*', the defendants could not rely on the general provision of O. 18 r. 19(1) of the ROC as the Rules Committee had provided the specific provisions of O. 70 rr. 17(1) and 18(1) of the ROC. (paras 21, 23 & 24)

(5) The plaintiffs had discharged the onus to persuade the court to exercise its discretion under O. 70 r. 17(1) read with O. 1A and O. 2 r 1(2) of the ROC to grant a dispensation order. This exercise of discretion was dependent on the following evidence and reasons: (i) the first plaintiff was only a passenger of the first boat at the time of the accident. The first plaintiff did not have knowledge of matters required in a preliminary act nor could the first plaintiff have any access to the required information; (ii) if the plaintiffs did not file a preliminary act in this action, no prejudice was occasioned to the defendants. The defendants who owned and operated the first and second boats, have actual knowledge of or access to the required information. Any breach of O. 70 r. 17(1) of the ROC by the plaintiffs was a mere technicality which caused no prejudice to the defendants; and (iii) if the court refuses to grant a dispensation order, there would be a grave injustice to the first plaintiff. (para 26)

Case(s) referred to:

Burns Philp & Co Ltd v. Nelson & Robertson Pty Ltd [1957] 1 Lloyd's Rep 267 ***(refd)***
Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***
Multi Square Sdn Bhd v. Lee Chee Meng [2015] 1 LNS 187 HC ***(refd)***
Owners of the ship "Al Tabith" v. Owners of the ship "Alanfushi" (Al Tabith) [1995] 2 Lloyd's Rep 336 ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Prithipal Singh @ Kirpal Singh s/o Wadhawa Singh v. Dato Bandar, Kuala Lumpur And Golden Arches Restaurant Sdn. Bhd. (Interveners) [1993] 4 CLJ 107 SC ***(refd)***
Seow Teck Ming & Anor v. Tan Ah Yeo & Anor [1991] 3 CLJ 2731; [1991] 4 CLJ (Rep) 576 CA ***(refd)***
Stolt Kestrel BV v. Sener Petrol Denizcilik Ticaret AS And Another Case [2016] 1 All ER (Comm) 843 ***(refd)***
"The Alnwick", Robinson [Widow and Administratrix of Robinson (deceased)] v. Owners of Motor Tug "Alnwick" and Owners of Motor Vessel "Braema" & Ors [1965] 2 All ER 569 ***(refd)***
The Niceto De Larrinaga, Navarro (Widow) [Administratrix of the estate of Navarro (deceased)] v. Larrinaga Steamship Co Ltd [1965] 2 All ER 930 ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 2(a), 3, 6(1)(a)
Merchant Shipping Ordinance 1952, ss. 2(a), 517
Rules of Court 2012, O. 1 r. 4(1), O. 1A, O. 2 r. 1(2), O. 18 r. 19(1), O. 59 r. 21, O. 70 rr. 17(1)(a), (aa), (d), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), 18(1), 19, O. 76 r. 2(1), O. 92 r. 4

Maritime Conventions Act 1911 [UK], ss. 8, 190(5), (6)
Merchant Shipping Act 1995 [UK], s. 190
Navigation Act 1912 [Aus], s. 396(1)

For the plaintiffs - Jason Ng Kau & Clarence Hng Ying Hui; M/s Jason Ng & Partners
For 1st to 7th defendants - Omar Kutty Abdul Aziz & Ooi Hean Ping; M/s Kuah, Lim, Chin & Ooi
For 8th & 9th defendants - Murad Ali Abdullah & Amathavally Krishnan Nair; M/s K'Mura & Co

Reported by Lina E

JUDGMENT
(encls. 6, 9 and 18)

Wong Kian Kheong J:

Background

[1] This is a sad case. On 15 August 2015, the first plaintiff (first plaintiff) boarded a boat with the registration no. BPK 855P (first boat) at Port Klang jetty with the purpose of going to Pulau Ketam.

[2] During the first boat's journey, the first boat collided with another boat with the registration no. BPK 872P (second boat). This collision caused the first plaintiff to suffer a serious brain injury (first plaintiff's injury).

This Action

[3] The second plaintiff (second plaintiff) is the first plaintiff's husband. In view of the first plaintiff's injury, the second plaintiff has obtained a court order under O. 76 r. 2(1) of the Rules of Court 2012 (RC) to be the first plaintiff's "litigation representative" in this suit (this action).

[4] This action has been filed on 18 January 2019 by the first and second plaintiffs (collectively referred to in this judgment as the "plaintiffs") to recover damages for the first plaintiff's injury from the following defendants:

(i) the first defendant (first defendant) is a partnership which owns the first boat;

(ii) the second to seventh defendants ("second defendant" to "seventh defendant") are the partners of the first defendant;

(iii) at the time of the collision between the first and second boats (accident)

(a) the first boat was skippered by the seventh defendant; and

(b) the eighth defendant (eighth defendant) was the skipper of the second boat; and

(iv) the ninth defendant (ninth defendant) is the owner of the second boat.

The first to ninth defendants shall be collectively referred to in this judgment as the "defendants".

[5] The statement of claim filed in this action has pleaded as follows, among others:

(i) the accident and the first plaintiff's injury were caused by the negligence of the seventh and eighth defendants in skippering the first and second boats respectively; and

(ii) the first to sixth defendants are vicariously liable for the seventh defendant's negligence while vicarious responsibility for the eighth defendant's negligence is imposed on the ninth defendant.

[6] The following three applications have been filed in this action:

(i) the plaintiffs have filed an application in court enclosure no. 6 (encl. 6) for a court order to dispense the plaintiffs from lodging with the "Registry' (defined in O. 1 r. 4(1) RC as, among others, the "Registry of the High Court') a "preliminary act" as defined on O. 70 r. 17(1) RC (preliminary act) within two months after the service of the writ of this action on the defendants (two-month period);

(ii) an application in court enclosure no. 9 (encl. 9) had been made by the eighth and ninth defendants to strike out this action on the following two grounds:

(a) this action is time-barred under s. 517 of the Merchant Shipping Ordinance 1952 (MSO); and/or

(b) the plaintiffs have failed to lodge a Preliminary Act within the two-month period as required by O. 70 r. 18(1) RC; and

(iii) the first to seventh defendants had filed an application in court enclosure no. 18 (encl. 18) to strike out this action because this action had been filed after the expiry of the two-year limitation period as prescribed by s. 517 MSO (two-year limitation period).

Issues

[7] The following questions arise in encls. 6. 9 and 18 (collectively referred to in this judgment as the "three enclosures"):

(i) with regard to encls. 9 and 18:

(a) whether the limitation period for this action based on a tort of negligence is:

(1) the two-year limitation period; or

(2) the six-year limitation period (six-year limitation period) as provided in s. 6(1)(a) of the Limitation Act 1953 (LA).

There is no previous Malaysian case which has decided on the above issue; and

(b) if the two-year limitation period applies to this action, should the court exercise its discretion under the first limb of the proviso to s. 517 MSO (proviso) to extend the two-year limitation period in this case? This is a novel question regarding the construction of the proviso; and

(ii) in respect of encls. 6 and 9:

(a) can the court resort to O. 18 r. 19(1), O. 92 r. 4 RC as well as the court's inherent jurisdiction and/or inherent power when the Rules Committee has provided specific provisions in O. 70 rr. 17(1) and 18(1) RC?; and

(b) whether the court should exercise its discretion under O. 70 r. 17(1) RC to grant the plaintiffs a dispensation of the requirement to file a preliminary act.

Which Limitation Period Applies To This Action?

[8] I reproduce below s. 517 MSO, ss. 3 and 6(1)(a) LA:

s. 517 MSO Limitation of actions.

No action shall be maintainable to enforce any claim or lien **against a vessel or her owners in respect of any damage or loss to another vessel**, her cargo or freight, or any property on board her, or **damages for loss**

of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, **unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused** or the salvage services were rendered, and an action shall not be maintainable under this Ordinance to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

LA

Saving for other limitation enactments.

3. [LA] shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration to which the Government or the Government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law.

Limitation of actions of contract and **tort** and certain other actions

6(1) **Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say**:

(a) **actions founded** on a contract or **on tort**; ...

(emphasis added)

[9] The accident occurred on 15 August 2015. According to learned counsel for the defendants, this action is time-barred under s. 517 MSO because this action is filed on 18 January 2019 after the lapse of the two-year limitation period (from the date of the accident).

[10] The term "vessel" in s. 517 MSO is defined widely in s. 2(a) MSO to include "any ship or boat or any other description of vessel used in navigation".

[11] I am of the view that s. 517 MSO applies if all the following circumstances exist:

(i) there is a collision between a vessel (Vessel A) and another vessel (Vessel B);

(ii) Vessel B has suffered the following damage:

(a) loss and/or damage to Vessel B;

(b) loss and/or damage to cargo, freight and/or property on Vessel B; and/or

(c) loss of life and/or personal injuries suffered by any person on board of Vessel B; and

(iii) Vessel A is at fault, either wholly or partly, for the above loss and/or damage to Vessel B.

[12] As explained in the above para. 11, s. 517 MSO does not apply to a negligence suit by a passenger in Vessel B who has suffered personal injuries due to the negligence of the skippers of Vessels A and/or B (such as this action). Hence, s. 517 MSO has not prescribed a limitation period for this action within the meaning of s. 3 LA and the six-year limitation period (not the two-year limitation period) applies to this action.

[13] The view stated in above paras. 11 and 12 is premised on the following reasons:

(i) our s. 517 MSO is similar to the then applicable s. 396(1) of Australia's Navigation Act 1912-1953 [NA (Australia)] which provides as follows:

> *No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damage for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault*, or in respect of any salvage services, *unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused* or the salvage services were rendered.
>
> (emphasis added)

In *Burns Philp & Co Ltd v. Nelson & Robertson Pty Ltd* [1957] 1 Lloyd's Rep 267, at 269, Taylor J, sitting as a single judge in the High Court of Australia (the apex court in Australia), has decided as follows regarding s. 396(1) NA (Australia):

> *In approaching the construction of [s. 396(1) NA (Australia)], it is, I think, of importance to bear in mind that it deals with distinct categories of claims, that is to say, it deals with claims in respect of loss or damage to vessels, their cargo and persons on board, and claims in respect of salvage services. But it does not deal with all claims in respect of damage to vessels, their cargo and persons on board; its operation is restricted to cases where the damage is occasioned, wholly or partly, by the fault of another vessel. If in framing the first part of s. 396, the draftsman had omitted the words 'against a vessel or her owners' and also the subsequent reference to the 'former vessel', and if the reference to 'another vessel' had been to 'any vessel', this part of the section would have travelled far beyond its obvious purpose. This*

purpose, which is made clear by the interpolation of the words 'against a vessel or its owners' and by the later reference to the 'former vessel' was to prescribe a period of limitation with respect to damage occasioned in a particular way, that is to say, damage occasioned by the fault of one vessel to another vessel or to cargo or persons on the latter vessel.

(emphasis added)

The above decision by Taylor J has been affirmed on appeal by a 4-1 majority decision of the High Court of Australia – please refer to (1958) 98 CLR 495; and

(ii) Section 517 MSO is similar to the then enforceable s. 8 of United Kingdom's (UK) Maritime Conventions Act 1911 [MCA (UK)]. Section 8 MCA (UK) provides as follows:

> *No action shall be maintained to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault*, or in respect of any salvage services, *unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused* or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:
>
> *Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit*, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

(emphasis added)

In *The Niceto De Larrinaga, Navarro (Widow) [Administratrix of the estate of Navarro (deceased)] v. Larrinaga Steamship Co Ltd* [1965] 2 All ER 930, at 932, Hewson J in UK's High Court has followed Taylor J's judgment in *Burns Philp & Co* in the interpretation of s. 8 MCA (UK).

[14] As explained in the above paras. 11 to 13, I cannot strike out this action based on s. 517 MSO because this action has been filed within the six-year limitation period.

Should Court Grant Extension Of Time Pursuant To Proviso?

[15] In the event that the two-year limitation period applies to this action, I shall now decide whether the court should exercise its discretion under the first limb of the proviso to extend the two-year limitation period in this case.

[16] Firstly, I am of the view that the proviso has the following two limbs (two limbs):

(i) the court has a discretion to extend the two-year limitation period:

(a) to any extent; and

(b) on any condition

as the court thinks fit (first limb); and

(ii) the court "shall" extend the two-year limitation period if there is no reasonable opportunity for a plaintiff during the two-year limitation period to arrest the defendant vessel within:

(a) the jurisdiction of the court; or

(b) the territorial waters of the country:

(1) to which the plaintiff's ship belongs;

(2) in which the plaintiff resides; or

(3) in which the plaintiff has his principal place of business

and the two-year limitation period shall be extended to an extent which is sufficient to give a reasonable opportunity for the plaintiff to arrest the defendant vessel (second limb).

[17] The above construction of the proviso is premised on the following reasons:

(i) as explained in the above para. 16, the subject matter of the first limb is different from the contents of the second limb. It is clear that the first and second limbs serve different purposes. Hence, the two limbs are distinct from each other;

(ii) a discretionary term "may" is used in the first limb whereas a mandatory term "shall" is employed in the second limb;

(iii) there is a comma between the first and second limbs. The court may refer to a punctuation mark in a statutory provision in the construction of that provision – please refer to a judgment of the Supreme Court delivered by Eusoff Chin SCJ (as he then was) in *Prithipal Singh @ Kirpal Singh s/o Wadhawa Singh v. Dato Bandar, Kuala Lumpur And Golden Arches Restaurant Sdn. Bhd. (Interveners)* [1993] 4 CLJ 107; [1993] 3 MLJ 336, at pp. 340-341;

(iv) the two limbs are demarcated by the word "and";

(v) Sellers LJ in UK's Court of Appeal case of *"The Alnwick", Robinson [Widow and Administratrix of Robinson (deceased)] v. Owners of Motor Tug "Alnwick" and Owners of Motor Vessel "Braema" & Ors* [1965] 2 All ER 569, at 573, has construed the then s. 8 MCA (UK) as follows:

> *The limitation, therefore, for enforcing this claim for loss of life against the Braemar was two years under [s. 8 MCA (UK)]. But, unlike the Limitation Acts, until the Limitation Act 1963, the period is not rigidly fixed; it is qualified in two ways. The first is discretionary [first Limb] and the second compulsory [2nd Limb].'*

(emphasis added); and

(vi) in UK, s. 8 MCA (UK) has now been replaced by s. 190 of Merchant Shipping Act 1995 [MSA (UK)] which reads as follows:

> *Time limit for proceedings against owners or ship.*
>
> 190(1) *This section applies to any proceedings to enforce any claim* or lien *against a ship or her owners*:
>
> (a) *in respect of damage or loss caused by the fault of that ship to another ship, its cargo or freight or any property on board it; or*
>
> (b) *for damages for loss of life or personal injury caused by the fault of that ship to any person on board another ship*.
>
> (2) The extent of the fault is immaterial for the purposes of this section.
>
> (3) *Subject to subsections (5) and (6) below, no proceedings to which this section applies shall be brought after the period of two years from the date when*:
>
> (a) *the damage or loss was caused*; or
>
> (b) *the loss of life or injury was suffered*.
>
> (4) Subject to subsections (5) and (6) below, no proceedings under any of sections 187 to 189 to enforce any contribution in respect of any overpaid proportion of any damages for loss of life or personal injury shall be brought after the period of one year from the date of payment.
>
> (5) *Any court having jurisdiction in such proceedings may, in accordance with rules of court, extend the period allowed for bringing proceedings to such extent and on such conditions as it thinks fit.*
>
> (6) *Any such court, if satisfied that there has not been during any period allowed for bringing proceedings any reasonable opportunity of arresting the defendant ship within*:
>
> (a) *the jurisdiction of the court, or*
>
> (b) *the territorial sea of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business*,
>
> *shall extend the period allowed for bringing proceedings to an extent sufficient to give a reasonable opportunity of so arresting the ship*.

(emphasis added)

The first and second limbs are similar to s. 190(5) and (6) MCA (UK) respectively. A

[18] As to how the court should exercise its discretion to extend the two-year limitation period pursuant to the first limb, I am of the following view:

(i) to persuade the court to extend the two-year limitation period in the first limb, a plaintiff has to satisfy the following two conditions cumulatively (two cumulative conditions): B

(a) the plaintiff has a "good reason" for an extension of the two-year limitation period (first condition); and

(b) if the plaintiff fulfils the first condition, the plaintiff has to persuade the court that the "balance of hardship" lies in favour of an extension of the two-year limitation period (second condition); C

(ii) the two cumulative conditions are laid down by the following two judgments of UK's Court of Appeal regarding s. 190(5) MCA (UK) (which is similar to the first limb): D

(a) in *Owners of the ship "Al Tabith" v. Owners of the ship "Alanfushi" (Al Tabith)* [1995] 2 Lloyd's Rep 336, Hirst LJ has decided as follows:

> *As a matter of law, the learned judge directed himself that the proper test is that:* E
>
> > The court will only extend the period of limitation if in all the circumstances of the case there is good reason for doing so.
>
> *In the light of the authorities to which I am about to refer, Mr Charlton QC, on behalf of the appellants, accepts that is a correct statement of the test.* F
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> *First and foremost, on the main point of principle, in my judgment the House of Lords' line of authority quoted above is fatal to Mr Charlton's submission that there is a one-stage and not a two-stage process. The correct two- stage test was placed beyond any shadow of doubt by Lord Brandon in the key passage in the Waddon case, as explained in Baly v Barrett.* G
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> *At stage one the court must consider whether good reason for an extension has been demonstrated by the plaintiff, which is essentially a question of fact. If, and only if, the plaintiff succeeds at stage one in establishing good reason does the court proceed to stage two, which is a discretionary exercise involving value judgements including, where appropriate, the balance of hardship, which then enters the arena for the first and only time.* H
>
> *It has been said many times that an explanation is required of the whole period, (2-and-a-half years in the present case) and not just of the last few weeks or months.*
>
> (emphasis added); and I

(b) the above judgment of Hirst LJ in *Al Tabith* has been applied by Tomlinson LJ in *Stolt Kestrel BV v. Sener Petrol Denizcilik Ticaret AS And Another Case* [2016] 1 All ER (Comm) 843, at [71] and [92], as follows:

> [71] The argument here was that even if the judge was right to regard himself as bound by the *Al Tabith*, as was common ground before him, he was nonetheless wrong to focus on the reasons why an *in personam* claim form was not issued in time and to leave out of account, in his evaluation of the question whether an extension of time should be granted, the factors set out at para [77](a)-(h) of his judgment. I regret that I do not understand this argument. *The Court of Appeal in the Al Tabith held that establishing a good reason for the failure to issue the writ in time is an essential element in the demonstration of a good reason for an extension of time. The judge simply applied that approach. In my judgment this ground of appeal has no independent life of its own.*
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> [92] *For all these reasons I would reject Ground 3(b) of the appeal. In my judgment the Al Tabith was correctly decided and was rightly applied by the judge here as indeed it was by Teare J in the Pearl of Jebel Ali.*
>
> (emphasis added)

(iii) Section 8 MCA (UK) is applicable in Singapore. In *Seow Teck Ming & Anor v. Tan Ah Yeo & Anor* [1991] 3 CLJ 2731; [1991] 4 CLJ (Rep) 576 at 584-586 & 591; [1991] 2 MLJ 489, at 494, 495 and 498, Chan Sek Keong J (as he then was) has delivered the following judgment of Singapore's Court of Appeal (its highest court):

> We now turn to the appeal against Chao Hick Tin JC's decision refusing the plaintiffs an extension of the limitation period. *Chao Hick Tin JC held that the plaintiffs had not shown 'substantial grounds or good reasons justifying the late issue of the writ'. He agreed that although the proviso to s 8 gave 'the widest possible discretion to the court' (per Sir E Pollock MR in The 'Arraiz' [1924] Ll L Rep 382; (1924) 132 LT 715, he decided that it was a discretion which should 'only be used in favour of the plaintiff if there are special circumstances which create a real reason why the statutory limitation should not take effect'* (per Hill J in *The 'Llandovery Castle'* [1920] P 119 at p 125). ...
>
> > *Counsel for the plaintiffs has contended that Chao Hick Tin JC was wrong in so holding as he had applied the test of 'substantial grounds' or 'special reasons', which was more stringent than was required under the law. Counsel referred us to two recent English cases on s 8 of the MCA 1911 which were decided after Chao Hick Tin JC's decision. In The 'Zirje'[1989] 1 Lloyd's Rep 493, Sheen J, after reviewing the previous decisions on the point, said, at p. 497:*
> >
> > > *... in the light of the speech of Lord Brandon of Oakbrook [in Waddon v. Whitecroft Scovell Ltd [1988] 1 WLR 309, concerning the exercise of discretion to renew the validity of a writ*

under O. 6 r. 8], and by parity of reasoning, a judge who is invited to extend the time limit set by s 8 of the Maritime Conventions Act 1911 should grant an extension if in all the circumstances of the case it appears to him that there is good reason for doing so. The exercise of his discretion to extend time should not be confined only to those cases where there appear to be exceptional or special circumstances.

In The 'Seaspeed America' [1990] 1 Lloyd's Rep 150, Sheen J again said, at p 153:

Parliament has not defined or sought to limit the circumstances in which or the extent to which the court may extend the time limit. Parliament has left those matters to the court and has given the court power to impose conditions. As Lord Brandon of Oakbrook said in The 'Myrto' (No 3) [1987] AC 597, at p 622, it is not possible to define or circumscribe the scope of the expression 'good reason'. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case.

We accept the test formulated by Sheen J for the reasons given by him. Whether or not an extension of time ought to be granted depends on the circumstances of each case; they need not be exceptional or special. …

Counsel for the plaintiffs has also contended that Chao Hick Tin JC exercised his discretion wrongly in refusing to take into account a crucial post-writ factor, ie the prejudice to the plaintiffs if leave to extend the limitation period is not granted. In an ordinary case where a plaintiff applies for extension of the limitation period before filing the writ or within a reasonable time thereafter in order to meet a plea of limitation, post-writ factors are not relevant to the court's exercise of discretion under s. 8 of the MCA 1911. However, the instant case is exceptional in that the defendants, at the time of Chao Hick Tin JC's judgment, have been able to plead, by leave of the court, the defence of limitation more than seven years after the commencement of the action. In principle, the merits of the plaintiffs' application should be determined by the circumstances prevailing at the date of the application. If such circumstances show that the plaintiffs' right to recover damages from or in connection with the accidental death of TKH has been extinguished or diminished in some way, that, in our view must be a material factor to be taken into account.

…

In view of our finding that the plaintiffs will suffer prejudice if leave is granted to the defendants to amend their defence, the decision of Chao Hick Tin JC in not extending the limitation period is wrong. Although the prejudice to the plaintiffs is a post-writ factor, it has

to be taken into account in an application for extension of the limitation period under the MCA 1911. In our view, Chao Hick Tin JC adopted too narrow a view of the ambit of s 8 thereof in limiting the relevant factors only to those occurring before the issue of the writ. The relevant factors must be those obtaining at the time the application is made or heard.

(emphasis added)

Premised on *Seow Teck Ming*:

(a) the first condition need not be satisfied by the existence of a "substantial ground", "special circumstances", "special reason", "exceptional circumstances" or "exceptional reason"; and

(b) a good reason may be based on matters which arise after the filing of the suit in question;

(iv) whether the two cumulative conditions are fulfilled in a particular case depends on the particular facts of that case. Furthermore, the court exercises a discretion pursuant to the first limb in deciding whether to extend the two-year limitation period or otherwise. Accordingly, cases on the application or non-application of the first limb cannot constitute binding legal precedents from the viewpoint of the *stare decisis* doctrine; and

(v) a plaintiff bears the burden to persuade the court that the two cumulative conditions have been satisfied so as to enable the court to extend the two-year limitation period – please refer to the dissenting judgment of Willmer LJ in *Alnwick*, at p. 578.

[19] I am satisfied that the plaintiffs have discharged the onus to satisfy this court of the two cumulative conditions so as to enable the court to exercise its discretion to grant an extension of the two-year limitation period (extension order) and allow this action to proceed under the first limb. My reasons are as follows:

(i) the first condition is fulfilled in this case as there is a good reason for the extension order. This is because the accident has caused the first plaintiff's injury which substantially diminishes her mental capability to file this action within the two-year limitation period.

I rely on two medical reports dated 2 March 2017 and 24 May 2019 regarding the first plaintiff which have been prepared by Dr Bharathi Vengadasalam, a consultant psychiatrist at Pantai Hospital, Kuala Lumpur (medical expert). The medical expert had examined the first plaintiff and provided the following expert opinion regarding the first plaintiff, among others (medical expert's opinion):

(a) the accident had caused a "traumatic brain injury" to the first plaintiff. Consequently, the first plaintiff has suffered and continues to suffer a "major neurocognitive disorder" (MND);

(b) due to the MND:

(1) the first plaintiff cannot weigh pros and cons. Hence, the first plaintiff could not instruct her solicitors to file this action before the expiry of the two-year limitation period. To fortify this fact, the second plaintiff has been appointed by the court as the first plaintiff's litigation representative in this action; and

(2) the first plaintiff's "socio-occupational functioning" (activities of daily living) is adversely affected; and

(c) as the first plaintiff ages, there is a risk that the MND will worsen.

It is to be noted that the defendants have not adduced any medical evidence to rebut the medical expert's opinion. Nor have the defendants appointed their own doctors to examine the first plaintiff. It is therefore clear that the medical expert's opinion is not disputed by the defendants in this case; and

(ii) the second condition is met in this case because the balance of hardship lies heavily in favour of the extension order. If the extension order is not granted, there will be a grave injustice to the first plaintiff as the first plaintiff will be unjustly deprived of any monetary relief for the MND. Furthermore, the first plaintiff's MND may worsen with the passage of time.

The extension order does not cause any irreparable prejudice to the defendants as the defendants have a right to oppose this action on its merits. After a trial of this action, the court may find the defendants to be not liable to the first plaintiff for the tort of negligence regarding the accident.

[20] All the cases cited by the defendants' learned counsel can be easily distinguished from this case because those cases do not involve MND which substantially diminishes an individual plaintiff's mental capability to file a suit within the two-year limitation period.

Whether Defendants Can Rely On O. 18 r. 19(1), O. 92 r. 4 RC, Court's Inherent Jurisdiction And/Or Inherent Power To Support Encls. 9 and 81

[21] The defendants' learned counsel have cited O. 18 r. 19(1), O. 92 r. 4 RC as well as the court's inherent jurisdiction and/or inherent power in support of encls. 9 and 18.

[22] I reproduce below O. 1A, O. 2 r. 1(2), O. 18 r. 19(1), O. 70 rr. 18 and 19 RC:

O. 1A **Regard shall be to justice**

In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

O. 2 r. 1(2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.

O. 18 r. 19 Striking out pleadings and endorsements

(1) **The Court may at any stage of the proceedings order to be struck out** or amended **any pleading** or the endorsement, **of any writ in the action**, or anything in any pleading or in the endorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

O. 70 r. 17 *Preliminary acts*

(1) In an action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships, unless the Court otherwise orders, the plaintiff shall, within two months after service of the writ on the defendant, and the defendant shall, within two months after entering an appearance in the action, **and before any pleading is served lodge in the Registry a document (which is referred to as a "preliminary act" in these rules) containing a statement of the following particulars**:

(a) the names of the ships which came into collision and their ports of registry;

(aa) the length, breadth, gross tonnage, horsepower and draught at the material time of the ship and the nature and tonnage of any cargo carried by the ship;

(b) the date and time of the collision;

(c) the place of the collision;

(d) the direction and force of the wind;

(e) the state of the weather;

(f) the state, the direction and force of the tidal or other current;

(g) the position, the course steered and speed through the water of the ship when the other ship was first seen or immediately before any measures were taken with reference to her presence, whichever was the earlier;

(h) the lights or shapes, if any, carried by the ship;

(i) the distance and bearing of the other ship if and when her echo was first observed by radar;

(j) the distance, bearing and approximate heading of the other ship when first seen;

(k) what light or shape or combination of lights or shapes, if any, of the other ship was first seen;

(l) what other lights or shapes or combination of lights or shapes, if any, of the other ship were subsequently seen before the collision, and when;

(m) what alterations, if any, were made to the course and speed of the ship after the earlier of the two times referred to in subparagraph (g) up to the time of the collision, and when, and what measures (if any) other than alterations of course or speed, were taken to avoid the collision, and when;

(n) the heading of the ship, the parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact;

(o) what sound signals, if any, were given, and when; and

(p) what sound signals, if any, were heard from the other ship, and when.

(2) Every preliminary act shall before filing be sealed by the Registrar and shall be filed in closed envelope (stamped with an official stamp showing the date of filing) and, unless the Court otherwise orders, no envelope shall be opened until the pleadings are closed and a consent signed by each of the parties or his solicitor to the opening of the preliminary acts is filed with the Registrar.

(3) Where the Court orders the preliminary acts to be opened, the Court may further order the action to be tried without pleadings but, where the Court orders the action to be so tried, any party who intends to rely on the defence of compulsory pilotage shall give notice of his intention to do so to the other parties within seven days after the opening of the preliminary acts.

(4) Where the Court orders the action to be tried without pleadings, it may also order each party, within such period as may be specified in the order, to file a statement of the grounds on which he charges any other party with negligence in connection with the collision and to serve a copy thereof on that other party.

(5) Order 18 rule 1, shall not apply to an action in which preliminary acts are required but, unless the Court orders the action to be tried without pleadings, the plaintiff shall serve a statement of claim on each defendant within fourteen days after the latest date on which the preliminary act of any party to the action is filed.

(6) A plaintiff shall serve a notice of filing his preliminary act on every defendant who has entered an appearance within three days of the service of the memorandum of appearance or upon filing his

preliminary act, whichever is the later. A defendant shall, upon filing his preliminary act, serve notice that he has done so on the plaintiff and on every other defendant who has entered an appearance.

O. 70 r. 18 *Failure to lodge preliminary act: Proceedings against party in default*

(1) Where in such an action as is referred to in rule 17(1) the plaintiff fails to lodge a preliminary act within the prescribed period, any defendant who has lodged such an act may apply to the Court by notice of application for an order to dismiss the action, and the Court may by order dismiss the action or make such other order on such terms as it thinks just.

(2) Where in such an action, being an action *in personam*, a defendant fails to lodge a preliminary act within the prescribed period, Order 19, rules 2 and 3, shall apply as if the defendant's failure to lodge the preliminary act within that period were a failure by him to serve a defence on the plaintiff within the period fixed by or under these Rules for service thereof, and the plaintiff, if he has lodged a preliminary act may, subject to Order 73, rule 7, accordingly enter judgment against that defendant in accordance with the said rule 2 or rule 3, as the circumstances of the case require.

(3) Where in such an action, being an action *in rem*, a defendant fails to lodge a preliminary act within the prescribed period, the plaintiff, if he has lodged such an act, may apply to the Court by notice of application for judgment against that defendant, and it shall not be necessary for the plaintiff to file or serve a statement of claim or an affidavit before the hearing of the notice of application.

(4) On the hearing of a notice of application under paragraph (3), the Court may make such order as it thinks just, and where the defendant does not appear on the hearing and the Court is of the opinion that judgment should be given for the plaintiff provided he proves his case, it shall order the plaintiff's preliminary act to be opened and require the plaintiff to satisfy the Court that his claim is well founded. The plaintiff's evidence may, unless the Court otherwise orders, be given by affidavit without any order or direction in that behalf.

(5) Where the plaintiff in accordance with a requirement under paragraph (4) satisfies the Court that his claim is well founded, the Court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action is brought to be appraised and sold and the proceeds to be paid into Court or make such order as it thinks just.

(6) The Court may, on such terms as it thinks just, set aside any judgment entered pursuant to this rule.

(7) In this rule, references to the prescribed period shall be construed as references to the period within which in accordance with rule 17(1) or of any order of the Court the plaintiff or defendant, as the context of the reference requires, is required to lodge a preliminary act.

(emphasis added)

[23] Firstly, the defendants cannot rely on O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power in light of the specific provisions in O. 70 rr. 17(1) and 18(1) RC. The following decisions of our apex courts have decided that the court cannot apply O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power to decide a matter when there is an express provision of written law which provides for the matter: A B

(i) the Supreme Court's judgment delivered by Syed Agil Barakbah SCJ in *Permodalan MBF Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178, at 181; and

(ii) the judgment of Zulkefli Ahmad Makinudin FCJ (as he then was) in the Federal Court in *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307, at 320. C

[24] Secondly, I am of the view that in accordance with the maxim of statutory construction, "*generalibus specialia derogant*, the defendants cannot rely on the general provision of O. 18 r. 19(1) RC as the Rules Committee has provided the specific provisions of O. 70 rr. 17(1) and 18(1) RC. It is decided in *Multi Square Sdn Bhd v. Lee Chee Meng* [2015] 1 LNS 187; [2015] 3 AMR 543, at [37(f)], as follows: D

> [37(f)] *Order 59 rule 22(1)(c)(i) RC is a specific provision for summary judgment applications and should be favoured over the general provisions of Order 59 rules 16(1), (2) and 21 RC in accordance with the rule of statutory interpretation of generalibus specialia derogant. In Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719, at 758-759, *the Court of Appeal applied the maxim generalibus specialia derogant to give effect to a specific provision of the National Land Code (NLC) in preference to a general provision in NLC.* E F
>
> (emphasis added)

Should Court Dispense Plaintiffs From Filing A Preliminary Act?

[25] I am of the following opinion regarding O. 1A, O. 2 r. 1(2), O. 70 rr. 17(1) and 18(1) RC: G

(i) in view of O. 1A and O. 2 r. 1(2) RC, all the RC, including O. 70 rr. 17(1) and 181) RC, "shall" be administered with regard to the "overriding interest of justice" and "not only to the technical non-compliance" with RC. Hence, all the cases regarding O. 70 rr. 17 and 18 RC which have been decided prior to the introduction of O. 1A in the Rules of the High Court 1980 [with effect from 16 May 2002 – please see the Rules of the High Court (Amendment) 2002, PU(A) 197/02], should be read with caution; H

(ii) the court has a discretion pursuant to O. 70 r. 17(1) RC (unless the court otherwise orders) to grant to a party a dispensation of the requirement to file a preliminary act (dispensation order). Such an exercise of discretion to grant or refuse a dispensation order is dependent on the I

particular facts of the case in question. It is axiomatic that a plaintiff (X) applying for a dispensation order bears the burden to persuade the court to exercise its discretion to allow a dispensation order; and

(iii) even if the court refuses to grant a dispensation order to X and if X has failed to file a preliminary act within the two-month period or has failed to file a preliminary act at all, upon an application by a defendant (who has lodged a preliminary act) to dismiss X's suit under O. 70 r. 18(1) RC, the court has the following discretionary power:

(a) the court may dismiss X's suit; or

(b) the court may "make such other order on such terms as it thinks just'.

In the exercise of the court's discretionary power pursuant to O. 70 r. 18(1) RC, O. 1A and O. 2 r. 1(2) RC require the court to have regard to the "overriding interest of justice" and "not only to the technical non-compliance" with O. 70 r. 17(1) RC.

[26] Firstly, I decide that the plaintiffs have discharged the onus to persuade the court to exercise its discretion under O. 70 r. 17(1) read with O. 1A and O. 2 r. 1(2) RC to grant a dispensation order in this case. This exercise of discretion is dependent on the following evidence and reasons:

(i) the first plaintiff was only a passenger of the first boat at the time of the accident. The first plaintiff did not have knowledge of matters required in a preliminary act as stipulated in O. 70 r. 17(1)(a) (ports of registry of the first and second boats), (aa), (d), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o) and (p) RC (required information). Nor could the first plaintiff have any access to the required information;

(ii) if the plaintiffs do not file a preliminary act in this action, no prejudice is occasioned to the defendants. This is because the defendants who own and operate the first and second boats, have actual knowledge of or access to the required information. It is therefore clear that any breach of O. 70 r. 17(1) RC by the plaintiffs is a mere technicality which causes no prejudice to the defendants; and

(iii) if the court refuses to grant a dispensation order, there will be a grave injustice to the first plaintiff as explained in the above sub-para. 19(ii).

[27] Alternatively, even if no dispensation order is granted under O. 70 r. 17(1) RC, I am not inclined to exercise my discretion to dismiss this action pursuant to O. 70 r. 18(1) read with O. 1A and O. 2 r. 1(2) RC. As stated in the above sub-para. 19(ii), a dismissal of this action under O. 70 r. 18(1) RC will cause a grave injustice to the first plaintiff. However, *in lieu* of a dismissal of this action, costs of the three enclosures. should be awarded in favour of the defendants.

Costs

[28] The court has a discretion under O. 59 r. 21 RC to award costs regarding the three enclosures. As explained in the above para. 27, I have decided to exercise my discretion pursuant to O. 70 r. 18(1) read with O. 1A, O. 2 r. 1(2) and O. 59 r. 21 RC to award costs of the three enclosures to the defendants.

Conclusion

[29] Based on the above evidence and reasons, the following decision is made regarding the three enclosures:

(i) enclosure 6 is allowed;

(ii) enclosures 9 and 18 are dismissed; and

(iii) one set of costs for the three enclosures shall be paid by the plaintiffs to:

  (a) the first to seventh defendants; and

  (b) the eighth and ninth defendants.

[30] In closing, I must express my gratitude to all learned counsel who have extended their valuable assistance to this court in deciding the above novel questions.